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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-961**

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

*Petitioners,*

—v.—

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITIONERS' REPLY BRIEF

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITIONERS' REPLY BRIEF

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### Preliminary Statement

The facts in this case, as found by both courts below, lay bare an open clash between New York's grant of employer-financed unemployment compensation to strikers and the national labor policy mandating government neutrality in labor disputes. That national policy leaves the outcome of

collective bargaining to the " 'free play of economic forces.' " *Lodge 76, IAM* v. *Wisconsin Employment Rel. Comm'n,* 427 U.S. 132, 140 (1976), quoting *NLRB* v. *Nash-Finch,* 404 U.S. 138, 144 (1971). So substantial is the conflict that although respondents[1] attempt to dismiss it as "irrelevant to the legal issues confronting this Court" (State 4),[2] they nevertheless seem impelled to try, albeit unsuccessfully, to blunt the force of the record facts which proved the conflict (State 4-14).

The State argues in effect that the detection of Congress' preemptive intent must be made *in vacuo;* inferred from a patchwork of unconnected items of legislative history, without any consideration of the significance of the national policy infringed upon, its central place in the labor relations scheme structured by Congress, or the extent of the infringement as found below. But "decipher[ing] the presumed intent of Congress," this Court has cautioned, is a "more complicated and perceptive process than is conveyed by the delusive phrase 'ascertaining the intent of the legislature.' " *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 239-40 (1959). Indeed, preemption questions need to be "translated into concreteness by the process of litigating elucidation." *IAM* v. *Gonzales,* 356 U.S. 617, 619 (1958). This is particularly so in a case such as this where Congress' claimed intent to depart from its own policy of national uniformity must be ascertained by inference, not discerned from express articulation.

The nature and extent of the conflict between state and federal law, as interpreted and applied, bear significantly on the resolution of preemption claims. This is the frame-

[1] Hereafter collectively referred to as "the State".

[2] Reference is to the Brief for Respondents.



work within which this Court has repeatedly resolved preemption issues in the past, as illustrated by the cases discussed in Point I of our main brief. And it was within just such a framework that the specific preemption issue now before this Court was treated by the United States Court of Appeals for the First Circuit in *Grinnell Corp.* v. *Hackett,* 475 F.2d 449, *cert. denied,* 414 U.S. 858, 879 (1973), and by the district courts both in this case and in *Hawaiian Tel. Co.* v. *Hawaii Dep't of Labor & Indus. Rel.,* 405 F. Supp. 275 (D. Hawaii 1975), *appeals docketed* (9th Cir. Mar. 19 and May 22, 1976) (Nos. 76-1584, 76-2056), *cert. prior to circuit court decision denied,* 46 U.S.L.W. 3599 (U.S. Mar. 27, 1978) (No. 77-962).

This Court's opinions in cases such as *Lodge 76, IAM* and *Teamsters Local 20* v. *Morton,* 377 U.S. 252 (1964), define the applicable federal preemption principles for determining an issue such as that here involved. Yet they are all but ignored in the State's brief[3] and in the *amici* briefs supporting its position. As they would have it, preemption analysis would begin and end in a search of the legislative history for congressional guidance. But the controlling principles to be applied in labor preemption cases such as this one were "born of this Court's efforts, *without the aid of explicit congressional guidance,* to delimit state and federal judicial authority over labor disputes." *Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 286 (1971) (emphasis supplied). Their application here, as discussed in Point I of our main

[3] The State relegates *Lodge 76, IAM* to a footnote (State 31) where it unsuccessfully attempts to distinguish that case from the one at bar. See discussion at pp. 8-9, *infra.*

brief, requires reversal of the Court of Appeals' decision under review.[4]

Against this background we proceed to examine the approaches taken by the State and those taken respectively by the Solicitor General and by the AFL-CIO as *amici*. The notable differences, indeed outright inconsistencies among them, bespeak the inherent unsoundness of the common conclusion they seek to draw.

## I

### The Conflict Between New York's Law and National Labor Policy.

The State's brief alternates between a claim that a trial is an "unsuitable vehicle" for deciding a preemption claim (State 4) and an all-out attempt to reargue the findings made by the District Court and accepted by the Court of Appeals (State 4-14). In the face of these findings and the massive documentary evidence, expert opinion and other record evidence which underlie them, the State's discomfort with the revelations of a trial is understandable.

The AFL-CIO brief, like the State's brief, rejects the *Grinnell* requirement of a trial such as was conducted

[4] The State and the AFL-CIO (the national and New York State AFL-CIO are jointly referred to herein as "AFL-CIO") seek to avoid the application of normal preemption analysis by trying to recast this case into the mold of *Malone* v. *White Motor Corp.*, 46 U.S.L.W. 4295 (U.S. Apr. 3, 1978) (No. 76-1184). *Malone*, as we shall see at pp. 15-17, *infra*, is clearly distinguishable on several grounds. Suffice it to say here that in *Malone* the Court found "clear" congressional guidance while, in marked contrast, the Court of Appeals in this case acknowledged the absence of any "positive expression of congressional intent" in the legislative record (Pet. 7a).



here (AFL-CIO 3).[5] Seeking to downplay its outcome, the AFL-CIO decries the appropriateness of a "battle of experts." As far as the documentary evidence emanating from unions acknowledging the value of unemployment compensation as a strike weapon is concerned, the AFL-CIO maintains a discreet silence. See Pet. 29a-33a.

The Solicitor General, however, effectively disassociates himself from the positions of the State and the AFL-CIO. Thus he frankly reports in his brief with respect to the Bell System strike which gave rise to this case that

> the district court found that the state unemployment compensation benefits in fact influenced the willingness and ability of employees to continue the strike (Pet. App. 28a-38a). It further found that the employers' resolve to withstand a strike was affected by the fact that their unemployment insurance account was approaching a negative balance (Pet. App. 27a-28a). The court concluded that, by altering "the balance of power among competing forces," the New York law conflicts with the policy of free collective bargaining established in the federal labor laws (Pet. App. 42a, 43a)....
>
> The court of appeals reversed. The court did not distrub the district court's finding that the New York law affected the balance of economic strength in the bargaining process. [Solicitor 3-4][6]

The Solicitor General further stated with respect to the overall impact of New York's law on strikes in general:

> The district court found that the availability of unemployment compensation to strikers under the New

[5] Reference is to the Brief for the American Federation of Labor and Congress of Industrial Organizations and the New York State AFL-CIO as *Amici Curiae*.

[6] Reference is to the brief for the United States as *Amicus Curiae*.

> York law increased the ability of employees to carry on the strike and weakened the resolve of employers to withstand it. *On the basis of these express findings, we do not dispute the correctness of the district court's conclusion that the availability of unemployment compensation under the New York statute has altered the economic balance between the bargaining parties.* [Solicitor 6; emphasis supplied, footnote omitted][7]

The soundness of the Solicitor's determination not to seek to revive in this Court the factual disputes twice fought and lost by the State in the courts below is supported not only by the ample record made at trial but also by this Court's frequently reiterated "two-court" rule under which it will not disturb concurrent factual determinations "by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).[8]

The District Court's findings in this case, accepted by the Court of Appeals, concerning the substantial impact exerted by New York's law are consistent with this Court's prior assessment of the impact of unemployment compensation on collective bargaining and strikes. Thus, referring

[7] The Solicitor's position was foreshadowed by his brief to this Court in *Kimbell, Inc.* v. *Employment Security Comm'n*, 429 U.S. 804 (1976), where it was noted that laws like New York's could have more impact than the New Mexico law involved therein. This distinguishing factor was again expressly acknowledged by the Solicitor in this case (Solicitor 6 n.6).

[8] The unwillingness of this Court to set itself against "the careful and reasonable conclusions of lower courts on purely factual issues" has particular force in cases, as the one at bar, where several of the disputed factual issues turned "on an assessment of the relative credibility of witnesses." *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636 (1967).



to the added costs to the struck employer who is financing the unemployment benefits, this Court stated in *Ohio Bureau of Employment Servs.* v. *Hodory*, 431 U.S. 471, 492 (1977):

> The only way for the employer to stop these rising costs is to settle the strike so as to return the employees to work. Qualification for unemployment compensation thus acts as a lever increasing the pressure on an employer to settle a strike.[9]

## II

## The Applicable Preemption Principles.

Although the Solicitor, as previously stated, accepts the finding below that New York's statute "has altered the economic balance between the bargaining parties," he resists the full force of its legal implications. As this Court has repeatedly recognized, the states are forbidden to " 'upset the balance of power between labor and management expressed in our national labor policy.' " *Lodge 76, IAM*, 427 U.S. at 146, quoting *Morton*, 377 U.S. at 259-60. That New York may have chosen to alter the federally-prescribed balance out of a desire to accommodate the interests of the parties to a labor dispute in a way which would conform most closely to its own version of government "neutrality,"[10] as argued in the State's brief (State 34-37),

[9] This Court's decision in *Hodory* is discussed at pp. 54-55 of our main brief.

[10] The Court of Appeals concluded that New York's law represents "a good faith effort to strike a balance between neutrality in the collective bargaining process—which the State maintains for the first eight weeks—and the social and economic well-being of its citizens." Pet. 12a n.5. Given the availability of food stamps and welfare benefits in New York for citizens, including strikers, who can establish *need*, there is, we submit, no warrant for the State out of concern for its citizens' well-being to intrude further

does not justify its intrusion into an area Congress left to the "'free play of economic forces.'" *Lodge 76, IAM,* 427 U.S. at 147, quoting *Nash-Finch,* 404 U.S. at 144. It is just such a diversity of various states' concepts of "balance" or "neutrality" that cannot be condoned if there is to be a uniform national policy.

The "economic weakness" of a party to a labor dispute —whether experienced in week one or week eight—"cannot justify state aid," for the "'use of economic pressure . . . is not a grudging exception [under] . . . the [federal] Act; it is part and parcel of the process of collective bargaining.'" *Lodge 76, IAM,* 427 U.S. at 149. State legislatures, this Court has cautioned, are

> without authority to attempt to "introduce some standard of properly 'balanced' bargaining power" . . . or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining." [*Id.* at 149-50]

The State in its brief (State 31) asks that *Lodge 76, IAM* be read narrowly to forbid state intrusion only where state law seeks to "police" the parties to a labor dispute or where it "brand[s] as unlawful" a specific economic tool. In short, it argues in effect that although the states may not *ban* resort to an economic tool, they may *create*

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and more pervasively into the collective bargaining arena through the payment of unemployment compensation to strikers, a benefit which under New York's law is payable with certainty to *all* strikers at a fixed time *regardless of need* and which is totally financed by the struck employer.

It should not be supposed from this discussion that the well-being of strikers and their families was the main consideration behind this legislation. Indeed, the trial judge commented that the "avowed purpose of the New York Labor Law was subverted for the purpose of mere administrative convenience" (footnote omitted) (Pet. 39a). See Pet. 38a-42a and pp. 17-18 of our main brief.



one equally, if not more potent, to be financed by one party for the benefit of the other. No such reading is suggested by the Court's holding nor by the language of the majority or concurring opinions in that case. In *Lodge 76, IAM,* the Court declared illegal Wisconsin's intrusion into a labor dispute to assist an employer which had been unable to achieve its objectives in collective bargaining by economic self-help means. Similarly forbidden under that case's rationale, we submit, is New York's intrusion into the collective bargaining arena after eight weeks to assist strikers and their union representative who had not achieved their negotiating objectives by self-help means.

When considered against the backdrop of this Court's opinion in *Lodge 76, IAM* and of its decisions in like cases, the Solicitor's argument that there is warrant for the "assumption"[11] that Congress intended to permit experimentation among the states in the area of unemployment compensation for strikers seems particularly tenuous. Certainly no assumption or inference can be made or drawn that Congress was willing to permit state-by-state alteration of the economic balance it had so delicately struck in the federal labor laws. Indeed no such assumption has ever been made by this Court in its preemption decisions. On the contrary, where state law has threatened to upset the economic balance created in the federal labor law, this Court has consistently preempted the state law, regardless of whether the state has acted through its own labor law as in *Lodge 76, IAM,* its antitrust law as in *Connell Constr. Co.* v. *Plumbers Local 100,* 421 U.S. 616, 635-36 (1975), or its unemployment insurance law as in *Nash* v. *Florida Indus. Comm'n,* 389 U.S. 235 (1967). Moreover, state experimentation is especially inappropriate in the

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[11] Solicitor 11.

domain of labor relations inasmuch as it was the perceived (by Congress) inability of state legislatures to stabilize conflict in that area that led it to enact a uniform, comprehensive federal labor law in the first place. *Lockridge*, 403 U.S. at 286.[12]

Before such a fundamental labor law concept as government neutrality is disavowed, and before it is forced to yield to separate determinations by the several states concerning whether, how and when strikers are to be subsidized in labor disputes under the mantle of unemployment insurance, a clearer and more positive expression of congressional will must be shown than is evident from the legislative record presented in this case. That record, we submit, is insufficient to form the basis for the major inroads upon well-established and fundamental federal labor policies such as those here involved.

## III

### The Claimed Scope of Permissible State Action.

Notwithstanding the absence of any positive expression of congressional intent either in the NLRA, as amended, in the federal unemployment insurance laws, or in any other federal enactment which might have some bearing on the subject, both the State (pp. 15, 21-23, 31) and the AFL-CIO (pp. 16-19, 31) espouse the view that Congress intended to invest each state with the right to determine its own policy regarding unemployment compensation for strikers, regardless of its impact on federal labor policy.

In this basic premise (which lies at the very core of their legal arguments in this case) the State and AFL-CIO

[12] See pp. 41-42 of our main brief.



are at odds with the Solicitor General. Speaking in his brief for the United States, the Solicitor states (p. 8 n.8):

> We do not suggest, however, that Congress afforded the states a blank check to enact any unemployment compensation provision they desire without regard to the demands of national labor policy.

This stand is confirmed in the closing pages of the Solicitor's brief (p. 25 n.25) wherein, after suggesting that it is unnecessary here to determine the "ultimate scope" of the options open to the individual states as far as unemployment payments to strikers are concerned, he acknowledges that whatever "freedom" of choice may exist, there are situations in which unemployment compensation for strikers would be "so destructive of the principles of the NLRA as to be beyond the contemplation of Congress."

This Court's decision in *Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235 (1967), stands as a refutation of the underlying premise advanced by the State and AFL-CIO in the case at bar. For in *Nash* the Court was called upon, as here, to assess the consequences of a conflict between the national labor policy and a state's unemployment compensation eligibility requirements. Its decision established the principle, equally applicable here, that state unemployment insurance eligibility requirements which tend to "frustrate" the purposes of the national labor legislation or stand as an "obstacle" to their full accomplishment must be outlawed. In this regard, state unemployment compensation laws must yield to federal superintendence in the labor field.[13]

[13] For a full discussion of *Nash*, see our main brief at pp. 27-29, 44-45.

The markedly different approaches employed by the State and the *amici* urging affirmance (State 30; AFL-CIO 12-15; Solicitor 8-9 n.8) in their efforts to distinguish *Nash* —the only previous labor preemption case decided by this Court involving state unemployment insurance eligibility requirements—in the end re-enforce the validity of that decision as a guiding precedent here.[14]

The Solicitor's approach is especially noteworthy. Discerning no difference in principle between *Nash* and this case, he seeks to distinguish them by arguing that the conflict between state and federal policy posed in *Nash* was not in the contemplation of Congress when it enacted the Social Security Act in 1935, while New York's grant of unemployment benefits to strikers "was within the express contemplation of Congress" (Solicitor 9 n.8). Essentially he bases his position on the view that Congress intended to approve the New York statute in particular. Although the Solicitor speaks at times in more sweeping terms (Solicitor 9), he is careful to keep open the possibility that some state laws granting payments to strikers

[14] The AFL-CIO's theory (AFL-CIO 12-15) that it was a broad "presumption" protecting an individual's right to resort to a remedial tribunal and not the federal labor policy which was the basis for preempting the state unemployment law in *Nash* is refuted by the Court's opinion there which discusses in detail the federal labor policy being interfered with and concludes that a "national system for the implementation of this country's *labor policy* is not so dependent on state law" (389 U.S. at 239; emphasis supplied).

The State in its brief (p. 30) recognizes that the specific provision of the NLRA involved in *Nash* did not by its express terms apply to the states or to state unemployment compensation laws, but it fails to square these facts with its central position in this case that the *only* limitations on the states in enacting unemployment eligibility requirements are those few prohibitions set forth in Section 903(a)(5) of the Social Security Act (State 22-23, 31). That position is completely at odds with the holding in *Nash*.



may have to yield to the federal labor policy (Solicitor 8 n.8, 25 n.25).

The conjecture that Congress was aware of the striker-benefit provision in New York's law at the time it enacted the NLRA and the Social Security Act of 1935 is not supported by the legislative record. For that record is barren of reference to a single item of evidence that Congress was aware of the existence of New York's striker-benefit provision, let alone the impact of that provision as written or as subsequently amended and applied.[15] In 1935 when Congress was enacting the federal labor and social security laws, not one penny in unemployment compensation had been paid out to any striker in New York. As discussed in our main brief (pp. 51-52), not even the drafters of New York's law were able to foresee the growing impact of that law on strikes and collective bargaining that has developed over the subsequent years.

The Solicitor's speculation that Congress approved New York's law in particular, and his appraisal that the New York law is not so destructive of principles in the NLRA as to have been beyond the contemplation of Congress, are especially questionable in this case where the strike being subsidized by State unemployment benefits was declared illegal by the National Labor Relations Board because it was in violation of Section 8(d) of the NLRA.[16]

[15] See pp. 49-52 of our main brief. The Solicitor acknowledges that the committee report on the Social Security Act of 1935 does not refer to the "specific feature" of New York's law under which benefits to strikers are granted (Solicitor 11). The AFL-CIO admits that Congress did not "address" the "question of benefits for strikers" in 1935 (AFL-CIO 4).

[16] A violation of this provision's prescribed 60-day bargaining period free from strikes and lockouts is no mere "technical" matter lightly to be dismissed, as the State would have it (State 6).

See p. 8 n.8 of our main brief. The argument pressed here —that it should be assumed that Congress was approving state subsidies to support strikers whose very act of striking was in violation of express prohibitions contained in its own labor laws—simply emphasizes the extremity to which the State and the *amici* urging affirmance have been driven.

Beyond the argument of implied congressional approval, the Solicitor is silent as to the major role unemployment compensation plays in keeping strikes alive in New York. See our main brief, pp. 5-17. If the payment of 49 million dollars to strikers in a single strike, all of which is charged against their struck employers, is not sufficiently destructive of the federal labor policy to invoke preemption, then one must attribute to Congress a willingness to see its national labor policy violated in a major way and its uniformity destroyed. Nothing in the legislative history justifies such a conclusion.

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This provision is an integral part of the NLRA's scheme to achieve labor peace through collective bargaining without disruptions to commerce. It is unlikely that Congress was willing to tolerate state laws, such as New York's, which subsidize all strikes regardless of whether they are in violation of the federal labor law. For example, New York's law would, no doubt, pay benefits to strikers not only in strikes in violation of Section 8(d) of the NLRA, but also in strikes in violation of the secondary boycott provisions of Section 8(b)(4) and in violation of the Section 8(b)(7) ban against certain union organizational strikes. The suggestion that all this was comprehended and contemplated by Congress, and that Congress wished to tolerate it, surely calls for a far more clear expression of legislative intent than anything that is contained in the legislative record herein.



## IV

## The Misplaced Reliance on *Malone*.

The State and the *amici* supporting its position have seized upon *Malone* v. *White Motor Corp.*, 46 U.S.L.W. 4295 (U.S. Apr. 3, 1978) (No. 76-1184) as though it represented an authority controlling the case at bar. In so doing, they have misread and misinterpreted what we take to be the plain meaning of the case and the limitations of its holding.[17] The teaching of both the majority and minority opinions in that case is that before the Court will permit state interference with a fundamental concept of federal labor law (such as free collective bargaining), it will require *clear* evidence of legislative intention to permit such interference. It was solely on this basis that the majority opinion distinguished but did not depart from the Court's decision in *Teamsters Local 24* v. *Oliver*, 358 U.S. 283 (1959).

Thus the majority opinion at least four times states that the statute and surrounding legislative history in *Malone* is "clear" as to what Congress intended in enacting the 1958 Disclosure Act. Moreover, the Court majority quoted at length Sections 10(a) and (b) of the Act which it considered to be the most "reliable indicium of Congressional intent." 46 U.S.L.W. at 4297.[18] Along with these

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[17] See pp. 34-35 n.29 of our main brief for our discussion of how the holding in *Malone* is supportive of our arguments here in favor of preemption.

[18] The sections provide in pertinent part:

[Section (b)]

The provisions of this Act . . . shall not be held to exempt or relieve any person from any . . . duty . . . provided by any present or future law . . . of any State affecting the operation

express provisions which explicitly acknowledge state authority to regulate pension plans substantively, the Court majority found confirmatory evidence in the legislative history surrounding the 1958 Disclosure Act.

In the *Malone* majority's view the express statutory directive and the legislative history established that Congress had "clearly indicate[d]," "clear[ly] . . . contemplated," "clearly envisioned" and "clearly anticipated" a broad regulatory role for the states in the pension plan area. 46 U.S. L.W. at 4297, 4299. It is this repeated (by the Court majority) emphasis on the *clarity* of the language of the statute and of the re-enforcing legislative history, that apparently persuaded the *Malone* majority to distinguish *Oliver*. The dissent, of course, found that not even this legislative record was sufficient to overrule the federal policy of free collective bargaining.

The absence of any express statutory language in the NLRA, or in any other federal legislation, which specifically authorizes the states to legislate on the subject of unemployment compensation for strikers, in itself, effectively distinguishes *Malone* from this case. Also absent here are the relatively explicit statements of legislative intent contained in the legislative history which were present in *Malone*. Congress as a body never dealt with the subject of unemployment compensation for strikers in 1935 and

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or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law.

[Section (a)]
Nothing contained in this subsection shall be construed to prevent any State from obtaining such additional information relating to any such plan as it may desire, *or from otherwise regulating such plan.* [Emphasis supplied]



the Court of Appeals itself acknowledged that "a positive expression of legislative intent is lacking" here (Pet. 7a).

The *Malone* decision is distinguishable on several additional grounds. *Malone* involved the issue of whether a state may provide for the substantive regulation of pension plans, a subject which is but one of many mandatory subjects of collective bargaining under the NLRA. The issue here, however, strikes at the very heart of the collective bargaining process under the national labor policy, posing the question whether a state may intervene in a labor dispute to aid one party at the expense of the other and thereby alter the economic balance of power struck by Congress. A less aggravated state intervention was expressly forbidden by this Court in *Lodge 76, IAM.*

The nature and extent of the conflict between federal and state law is graver, more extensive and more critical here than in *Malone.* Accordingly, only the most explicit expression of congressional intent to "tolerate the conflict" could have justified overruling the clear case for federal preemption presented here. See pp. 7-8 n.10, *supra.*

## V

## The Legislative History.

### A. *Congressional Awareness and Intent in 1935.*

As previously noted, the State and *amici* supporting its position have failed to cite a single indication that Congress was aware in 1935 of the existence, much less the potential and extensive impact, of New York's unemployment insurance striker-benefit provision (see pp. 10-14, *supra,* and pp. 50-52 of our main brief). Nor is there any express provision on the subject in the NLRA or in the Social Security Act of 1935. The attempt in 1978 to convert this silence of Congress in 1935 into an affirmative intent would

indeed be stretching the interpretive process beyond supportable limits.[19]

The Solicitor cites relief payments to strikers by the Federal Emergency Relief Administration ("FERA") as indicating congressional awareness of FERA's policy of such payments. Building on this he would in turn infer congressional approval of unemployment compensation for strikers (Solicitor 11-12). But the inference is insupportable for several reasons: (1) there is no citation to any congressional record to support the underlying inference of congressional awareness of the FERA payments; (2) FERA payments, unlike unemployment compensation, were made on the basis of need and were not financed by the struck employer; and (3) there is no proof here as to the impact of such payments on strikes.

The State argues that Congress in 1935 would also have been aware of certain statistics concerning long strikes. However, the statistics cited were not published until 1937. State 25. Moreover, there is no evidence in the legislative record here that Congress ever considered these statistics in its legislative deliberations in 1935 or at any other time. As discussed in our main brief (pp. 50-52), the impact of New York's law in any event did not become apparent until later years and until after subsequent amendments, such as those involving experience-rating.

Ignored by the State and the *amici* supporting its position in their discussion of the legislative history is the

[19] The lack of evidence of congressional awareness in 1935 has driven the AFL-CIO to the extreme of citing a New York Times editorial (not a part of the record below) which appeared in a Saturday edition in April 1935 and which contained a single sentence referring to New York's striker-benefit provision (AFL-CIO 27-28). There is no proof that any member of Congress ever read it.



significance Congress placed on the need for a uniform national labor policy, which recognition is reflected in the NLRA. See our main brief 40-42. There is no indication in the legislative history that Congress was willing to subject this policy to the obstruction and frustration which would flow from state-by-state determinations concerning the grant of unemployment compensation to strikers.

**B. *Congress' Inaction in 1947.***

As discussed in our main brief (pp. 52-53), Congress' silence and the failure of a proposal to emerge from conference committee is not probative of the intent of Congress as a whole. Even where a specific congressional committee clearly states a position concerning its intent, this Court has recently observed, courts should be "'extremely hesitant to presume general congressional awareness'." *TVA* v. *Hill*, 46 U.S.L.W. 4673, 4683 (U.S. June 15, 1978) (No. 76-1701), quoting *SEC* v. *Sloan*, 46 U.S.L.W. 4426, 4431 (U.S. May 15, 1978) (No. 76-1607).

**C. *1969 Nixon Administration Proposal.***

The Nixon Administration's proposal in 1969 to bar unemployment compensation for strikers, as a part of broader legislation to amend the FUTA, was not considered by either house of Congress. A bill introduced by Chairman Mills, which did not contain any proposal on the subject of striker benefits, was approved by the House Ways and Means Committee and debated briefly before the House.[20] The Mills statement relied upon so heavily by the State (State 16, 29-30) and the *amici* (AFL-CIO 30-31; Solicitor 23) as a statement of "Congressional intent", significantly was made in response to a question unrelated to striker

[20] See 115 Cong. Rec. 34102-10.

benefits.[21] The House's passage of Mills' bill cannot be read as a rejection of the Nixon Administration's proposal on striker benefits since that proposal was neither included in the bill nor debated on the floor of the House. Furthermore, there is no evidence that the proposal was considered at all at any level in the Senate.

Considering the Mills statement in context—coming as it did almost 35 years after the pertinent federal legislation here under consideration was enacted—it is evident that it represents only the " 'personal view' " [22] of a legislator and " 'however explicit cannot serve to change the legislative intent of Congress' " at the time the pertinent legislation was passed in 1935. *TVA* v. *Hill,* 46 U.S.L.W. at 4684, quoting *Regional Rail Reorganization Cases,* 419 U.S. 102, 132 (1974).

**D. *Welfare and Food Stamps.***

In their heavy reliance on legislative history relating to the welfare and food stamp programs (State 17, 45-46; AFL-CIO 43-46; Solicitor 23 n.24), the State and *amici* urging affirmance simply ignore the crucial differences between these public assistance programs and unemployment insurance. Unlike public assistance, unemployment insurance for strikers (1) is certain of receipt at a fixed

[21] It related to the rights of retired municipal employees collecting disability benefits to collect unemployment compensation as well. 115 Cong. Rec. 34106.

[22] Other legislators have expressed a totally different view. Thus the Senate Finance Committee in a 1972 report supporting legislation which would have disqualified children of strikers from receiving AFDC (welfare) benefits, stated:

> This disqualification, adapted from the unemployment insurance laws, is designed to prevent the government financing one side of a labor-management dispute. [S. Rep. No. 92-1230, 92d Cong., 2d Sess. 108]



time and easy to qualify for,[23] (2) is financed solely by the struck employer and (3) requires no demonstration of need.

In cases of economic deprivation and on a showing of need, Congress has expressly and affirmatively provided for the disbursement of food stamps and permitted welfare benefits for strikers as part of *its* accommodation of the federal labor policy to other objectives. Its failure to do so with respect to unemployment insurance, if anything, manifests an intention not to permit unemployment compensation for strikers.

**E. *The Railway Unemployment Insurance Act.***

As we have discussed in our main brief (pp. 56-57), collective bargaining under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), is far less a free and unregulated economic struggle than it is under the NLRA. Thus, the payment of unemployment compensation to RLA strikers is not as significant an element in collective bargaining under that Act. The AFL-CIO seeks to diminish the importance of this distinction by pointing out that airline employees, covered under the RLA, are not covered under the Railway Unemployment Insurance Act ("RUIA") (AFL-CIO 26-27).

The exclusion of airline employees from the RUIA was the consequence of the decision to take "advantage" of the "economy of administration" which would result in "mak-

[23] For example, the requirement that strikers must be available for and seek other work in order to obtain unemployment compensation is only loosely enforced. Tr. 759-65, A. 396-98. In contrast, strikers have "difficulty applying for and being certified for food stamps." H. Rep. 95-464, 95th Cong., 1st Sess. 129 (1977). As for welfare payments, the strike which gave rise to this case showed that resort to them was minimal (less than 1,000 employees in the CWA strike) compared with the almost universal collection of unemployment compensation by the strikers (more than 33,000 received benefits) (see our main brief p. 12).

ing the coverage [under RUIA] the same as the Railroad Retirement Act" ("RRA") from which airline employees were earlier omitted.[24] At the time the RRA (the railroad industry's counterpart to the retirement provisions of the Social Security Act) was enacted in 1935, the fledgling airline industry had not yet been brought under the coverage of the RLA.

We believe it appropriate here to reiterate this Court's warning that "all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes." *Chicago & North Western Ry. Co.* v. *United Transportation Union,* 402 U.S. 570, 579 n.11 (1971).

## VI

**The Eleventh Amendment Does Not Bar a Refund of Employer Overpayments From the Unemployment Insurance Fund.**

The District Court's judgment in this case directed prospective declaratory and injunctive relief including an order requiring the readjustment of the Bell Employers' (petitioners herein) experience rating accounts in the Unemployment Insurance Fund ("Fund") (Pet. 20a-21a).

This relief was requested and granted so that in the computation of these employers' current and future unemployment insurance contribution rates they will not continue to be penalized because of the payment of benefits made to the CWA strikers in 1971 and 1972. It requires a bookkeeping adjustment and is prospective in nature.

[24] Hearings on H.R. 10127 Before a Subcomm. on the Railroad Unemployment Ins. Sys. of the House Comm. on Interstate and Foreign Com., 75th Cong., 3d Sess. 30 (1938) (statement of Charles M. Hay, counsel for the legislation's chief proponent).



These forms of relief are not in dispute in this case; nor could they be in light of such cases as *Ex Parte Young,* 209 U.S. 123 (1908), cited with approval in *Edelman* v. *Jordan,* 415 U.S. 651 (1974).

What the State does challenge is the portion of the request for relief which sought a monetary refund on the basis of a readjustment of tax rates in *prior* years. See Complaint 21, ¶5, A. 32-33. This is a claim against the Fund for overpayments in employer contributions resulting from increased employer tax rates assessed against them (commencing in 1972 and continuing thereafter) which, in turn, were directly attributable to the unlawful payments made to strikers and charged against the Bell Employers' experience rating accounts in 1971 and 1972.[25] The overpayments for the New York Telephone Company, alone, amounted to more than $6,000,000 in 1972 and more than $9,000,000 in 1973. Pre-Trial Order ("PTO") 12, ¶35(f), A. 60.[26]

The State argues against the recoupment of overpayments from the Fund (State 50-59). In essence its contention is that, for the purposes of applying the Eleventh Amendment's doctrine of sovereign immunity, monies paid out of the Fund must be considered as state funds and, accordingly, any federal judgment seeking to reach such funds would be prohibited by the Eleventh Amendment.

[25] An employer's contributions to the Fund are computed on the basis of the employer's experience rating which in turn is based on the balance remaining in his individual account at the end of each year after crediting the employer's contributions made during the year and debiting the benefit payments made to the employer's former or present employees during the same year. Thus the fewer benefit payments chargeable to an employer's account, the smaller his contribution rate will be in future years.

[26] Additional overpayments have since been made in 1974, 1975, 1976, 1977 and 1978.

The District Court concluded (Pet. 53a-54a) that this contention is without merit, inasmuch as the record facts[27] established that the Fund (1) exists separate and apart from the State's general funds and treasury,[28] (2) consists *entirely* of unemployment insurance contributions by employers and some federal funds,[29] (3) receives no state funds of any kind and is used solely to pay benefits and to refund employer contributions erroneously or unlawfully collected.[30] The State, moreover, as found by the District Court below, *"has expressly shielded its treasury from any obligations arising out of the payment of unemployment insurance benefits and/or the administration and operation of the fund."* Pet. 54a (emphasis supplied); N.Y. Labor Law §550 (McKinney 1977).[31]

The Court of Appeals did not reach the Eleventh Amendment issue and, accordingly, it was first raised in this Court in the Brief for Respondents (State 2, 50-59).[32]

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[27] These facts were extracted from (a) the *agreed facts* in the Pre-Trial Order, (b) the face of the governing statutes and (c) publications issued by the New York State Department of Labor, a party to these proceedings.

[28] N.Y. Labor Law §§550, 553.

[29] PTO 4, ¶ 11, A. 51-52.

[30] N.Y. Labor Law §§550, 570.

[31] The refund here sought, as required by New York State statute, will be payable out of the Fund itself and not out of the State treasury:

> Any credit or refund of contributions erroneously collected . . . shall be a charge against the unemployment insurance fund. [N.Y. Labor Law §570 subd. 5]

[32] The Eleventh Amendment question presented to the Court of Appeals, as stated in the Bell Employers' brief, was:

> Whether the Eleventh Amendment to the United States Constitution may be used as a shield to bar a refund from the Unemployment Insurance Fund—a fund maintained separate from the state's treasury and financed solely by employer and federal contributions—of overpayments unlawfully required of the employers herein as a consequence of some 49 million dollars in unemployment compensation paid out to strikers during the 1971-1972 strike by the Communications Workers of America against them.



This Court in *Edelman* held that a retroactive award of wrongfully withheld state welfare benefits could not be made by the federal courts since "a suit by private parties seeking to impose liability which must be paid from *public funds in the state treasury* is barred by the Eleventh Amendment." 415 U.S. at 663; emphasis supplied.

Elsewhere in its opinion the Court explains its objections to the award of retroactive payment of welfare benefits in the case before it in these terms:

> The funds to satisfy the award in this case must inevitably come from the *general revenues of the State of Illinois* . . . . [415 U.S. at 665; emphasis supplied]

And, at 415 U.S. at 677, the Court sums up:

> Though a §1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award *which requires the payment of funds from the state treasury.* [Emphasis supplied; citations omitted][33]

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[33] The State's assertion in its brief (pp. 51-52) that *Edelman's* use of terms such as "general revenues of the State" and "state treasury" was merely "generic" seeks to obscure a distinction found to be crucial in post-*Edelman* decisions, including several cited by the State. Such decisions have turned on the factual issue of whether the state's treasury has been so shielded that legislative appropriations from the state's general revenues would not be required. *See, e.g., Bowen* v. *Hackett,* 387 F. Supp. 1212 (D.R.I. 1975); *Schiff* v. *Williams,* 519 F.2d 257, 262 (5th Cir. 1975); *Miller-Davis Co.* v. *Illinois State Toll Highway Authority,* 567 F.2d 323, 327 (7th Cir. 1977). It has been only upon a finding that such general revenues would be involved that the Eleventh

Thus the Court's opinion in *Edelman* emphasizes that it is only an award of retroactive damages against a state treasury which is barred by the Eleventh Amendment. But an award of retroactive damages against an independent state-administered fund, existing separate and apart from the state treasury, for liabilities from which the state, by statute, has shielded its treasury, is totally proper under the Eleventh Amendment.

As suggested by the *Edelman* opinion and supported by the entire body of law on the subject, the crucial factors in determining the Eleventh Amendment immunity of public authorities or independent funds, such as the Unemployment Insurance Fund here involved, are (1) whether their assets are exclusively their own and (2) whether the state's treasury or general funds have been insulated against monetary liability. These were the primary factors relied on by the federal district court in Rhode Island in a post-*Edelman* decision holding that an award of retroactive damages against that state's unemployment insurance fund and its temporary disability insurance fund is not barred by the Eleventh Amendment. *Bowen* v. *Hackett*, 387 F. Supp. 1212 (D.R.I. 1975).

*Bowen* involved a challenge to those provisions of the Rhode Island Unemployment Insurance Act and Temporary Disability Insurance Act which "routinely" provided for children's dependency allowances to unemployed males while requiring females to prove dependency to the satisfaction of the Director of the Rhode Island Department

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Amendment has barred recovery. *See, e.g., Fitzpatrick* v. *Bitzer*, 519 F.2d 559 (2d Cir. 1975), *rev'd in part on other grounds*, 427 U.S. 445 (1976); *Trotman* v. *Palisades Interstate Park Comm'n*, 557 F.2d 35, 38 (2d Cir. 1977); *Jagnandan* v. *Giles*, 538 F.2d 1166, 1176 (5th Cir. 1976); *Wade* v. *Mississippi Co-op Extension Servs.*, 424 F. Supp. 1242 (N.D. Miss. 1976).



of Employment Security. The challenged provisions were declared unconstitutional and the court was called upon to decide the question of back payments in light of the Supreme Court's decision in *Edelman*. The controlling issue after *Edelman*, according to Chief Judge Pettine, was "whether a judgment having a direct impact on these funds [the Employment Security Fund, Rhode Island's counterpart of the New York Unemployment Insurance Fund, and the Temporary Disability Insurance Fund] constitutes a suit against the state, *i.e.*, to be paid 'from public funds in the state treasury', in the context of the Eleventh Amendment." 387 F. Supp. at 1220.

In concluding that such a judgment against the funds was not barred by the Eleventh Amendment, Chief Judge Pettine gave the following rationale:

> The mere fact that a particular agency or instrumentality was created by the state legislature and performs certain governmental functions is not dispositive of this [Eleventh Amendment] issue.
>
> *There has developed a clear line of judicial authority which has held that if the legislature has intentionally insulated the treasury of the state from any liabilities that a particular financially self-sustaining instrumentality might incur, that instrumentality does not constitute the 'alter ego' of the State, and suit against such a body or its officers is not barred by the Eleventh Amendment.* . . . By analogy, these cases are persuasive authority that the *funds in question herein are not 'public funds in the state treasury' for Eleventh Amendment purposes.* [387 F. Supp. at 1220; emphasis added; citations omitted]

The pertinent facts as to the New York State Unemployment Insurance Fund and program (as found below) are indistinguishable from those in *Bowen*[34] and the rule of law therein laid down is fully applicable here.

The *Bowen* opinion is especially significant here not only because it is the only reported case which deals with the issue of the sovereign immunity under the Eleventh Amendment of a state's unemployment insurance fund but also because it has been cited with apparent approval and the analysis it employed has been adopted by the Second Circuit in *Fitzpatrick* v. *Bitzer,* 519 F.2d 559 (1975), *rev'd in part on other grounds,* 427 U.S. 445 (1976), by the Fifth Circuit in *Houston Welfare Rights Organization, Inc.* v. *Vowell,* 555 F.2d 1219, 1227 (1977), *pet. for cert. granted sub nom. Chapman* v. *Houston Welfare Rights Organization,* 46 U.S.L.W. 3526 (No. 77-719) (argued Oct. 2, 1978), and by the Ninth Circuit in *Hutchison* v. *Lake Oswego School Dist. No. 7,* 519 F.2d 961, 966-67 (1975), *cert. denied,* 429 U.S. 1037 (1977).

In *Fitzpatrick* the Second Circuit reasoned that in disposing of an Eleventh Amendment claim, "[t]he most important factor, of course, is whether, in the event plaintiff prevails, judgment will have to be paid out of the state treasury." 519 F.2d at 564. The *Bowen* case was distinguished because there the state had no legal duty to replenish the fund if it should become depleted or to pay a judgment against the fund, whereas in *Fitzpatrick,* the state was required to appropriate funds and to pay at least 75% of the total retirement payments there involved. Accordingly, said the court, "[a] judgment against the fund would thus automatically increase the obligations of the general state treasury and amount to a judgment against the state." 519 F.2d at 565 (footnote omitted).

[34] The State's discussion at pages 57-58 of its brief conveys an erroneous and misleading impression that under certain circumstances the Unemployment Insurance Fund in New York might be the beneficiary of appropriations by the State legislature. But the statutory provision on which it relies does not deal with the Unemployment Insurance Fund out of which any recoupment here would be payable. Instead, it deals with the Unemployment Administration Fund, which is separate and distinct from the former. The Administration Fund is used solely "for the proper and efficient administration" of the unemployment insurance system and not for the payment of benefits or for the refund of overpayments of employer contributions. See New York Labor Law §551(1).



This Court, in affirming in part and reversing in part the decision of the Second Circuit in *Fitzpatrick,* held that the Eleventh Amendment did not bar an award under Title VII of the Civil Rights Act of 1964, as amended, of retroactive retirement benefits since the Eleventh Amendment's bar is limited by the Fourteenth Amendment, under which Congress enacted Title VII. The Court's analysis in *Fitzpatrick* (which "begins where *Edelman* ended," 427 U.S. at 452), leaves undisturbed and, indeed, reiterates and re-confirms that its earlier *Edelman* decision was predicated on the finding that the damage award there sought was "payable to a private party from the *state treasury.*" *Ibid.* (emphasis supplied).

The Fifth Circuit in *Houston,* after noting that the state unemployment insurance fund in *Bowen* was "financed solely by employers' contributions," proceeded to distinguish *Bowen* from the case before it in the following language:

> In our case, however, the separate funds created for public welfare programs are only a matter of bookkeeping convenience: they are still funded by the state so that any award would resemble too closely a money judgment against the state itself. [555 F.2d at 1227]

In *Hutchison,* the Ninth Circuit quoted from and closely followed the rationale of the *Bowen* decision. It concluded that there was no Eleventh Amendment immunity in that case because the state treasury was shielded from ultimate liability.

These cases do not stand alone for, like them, the great weight of authority reveals that sovereign immunity is no bar to jurisdiction where the state treasury is protected from liability.[35] And, conversely, immunity is consistently found where the state treasury is actually or potentially exposed to liability under awards against public authorities or funds.[36]

In light of these authorities and of New York's unemployment compensation legislative scheme, the State cannot be heard to urge that the employers herein should be denied an effective remedy in federal court on the basis of the Eleventh Amendment.[37]

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[35] *Forman* v. *Community Servs., Inc.*, 500 F.2d 1246, 1256 (2d Cir. 1974), *rev'd on other grounds sub nom. United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837 (1975) (see dissenting opinion agreeing with Second Circuit on Eleventh Amendment issue, *id.* at 866-67 n.6); *Doris Trading Corp.* v. *SS Union Enterprise,* 406 F. Supp. 1093, 1096 (S.D.N.Y. 1976); *Raymond Int'l, Inc.* v. *M/T Dalzelleagle,* 336 F. Supp. 679, 681-82 (S.D.N.Y. 1971); *Idaho Potato Comm'n* v. *Washington Potato Comm'n,* 410 F. Supp. 171, 176 (D. Idaho 1975); *Dyson* v. *Lavery,* 417 F. Supp. 103, 108-09 (E.D. Va. 1976); *Matter of Dormitory Authority of the State of New York,* 18 N.Y. 2d 114 (1966).

[36] This was the rationale for the Second Circuit's finding of immunity in *Rothstein* v. *Wyman,* 467 F.2d 226 (1972), *cert. denied,* 411 U.S. 921 (1973). *See also Charles Simkin & Sons, Inc.* v. *State U. Constr. Fund,* 352 F. Supp. 177 (S.D.N.Y.), *aff'd,* 486 F.2d 1393 (2d Cir. 1973).

[37] The cases relied upon by the State (pp. 55-58) in its Eleventh Amendment argument neither support nor point to a different conclusion. Thus, *Ford Motor Co.* clearly involves the refund of taxes from the *state treasury,* a situation not here involved. And both *Wade* and *Jagnandan* involved a fund consisting of monies "commingled" with legislatively-appropriated monies and "taken into account by the state legislature in determining . . . [future] appropriations." *Wade,* 424 F. Supp. at 1257. As for the State's reliance upon the *Moss Planing Mill, Gullet Gin Co.* and *Carmichael* cases, in none of them was the court presented with an Eleventh Amendment issue (State 56, 59).

[38] This would embrace the District Court's resolution of the Eleventh Amendment issue.



## CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed and that the judgment of the District Court (Pet. 19a-22a) should be reinstated in all respects.[38]

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Respectfully submitted,

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